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Issue 5 *A Tribute to Franklin D. Cleckley: A Compendium of Essential Legal Principles From His Opinions as a Justice on the West Virginia Supreme Court of Appeals*

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Domestic Relations

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> equitable principles. Initially, the court must identify the alleged wrongful conduct and determine if it warrants a sanction. The court must explain its reasons clearly on the record if it decides a sanction is appropriate. To determine what will constitute an appropriate sanction, the court may consider the seriousness of the conduct, the impact the conduct had in the case and in the administration of justice, any mitigating circumstances, and whether the conduct was an isolated occurrence or was a pattern of wrongdoing throughout the case.[236]

VI. DOMESTIC RELATIONS

A. Domestic Violence

In a forceful and committed tone, Justice Cleckley wrote in the case of *In re Browning*[237] that "[d]omestic violence cases are among those that our courts must give priority status. In W. Va. Code, 48-2A-1, et seq., the West Virginia Legislature took steps to ensure that these cases are handled both effectively and efficiently by law enforcement agencies and the judicial system."[238] The *Browning* opinion set out guidelines for courts to follow in issuing domestic violence protective orders, when a court may be disqualified from addressing the matter:

> Magistrates are statutorily required to provide an individual with any assistance necessary to complete a petition for a protective order. Once the petition is completed, the magistrate must file the petition and, upon a showing of sufficient facts, issue a protective order. If a magistrate believes that she or he is disqualified from handling the matter, the magistrate must examine carefully whether the rule of necessity applies. Under no circumstances should a victim of abuse be turned away from a magistrate or a circuit judge without ensuring the victim will receive prompt attention by another magistrate or judge.[239]

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236 *Id.* at Syl. Pt. 2.

237 452 S.E.2d 34 (W. Va. 1994).

238 *Id.* at Syl. Pt. 6.

239 *Id.* at Syl. Pt. 7.

B. Divorce

Marital and separate property were addressed by Justice Cleckley in *Burnside v. Burnside*:[240]

> When a spouse uses separate property to retire the mortgage of property titled jointly, a gift to the marital estate is presumed. This presumption is rebuttable only by clear, cogent, and convincing evidence that a gift was not intended or that the transaction under scrutiny was the result of coercion, duress, or deception.[241]

Justice Cleckley cautioned that

> [t]he presumption of a gift to the marital estate may not be rebutted by evidence that merely reflects the motivation for making the gift or an uncommunicated and subjective state of mind of the transferring spouse or that, when viewed alone, can be considered inconsistent with the intent to maintain the property as separate.[242]

Justice Cleckley profoundly impacted the issue of alimony in the case of *Banker v. Banker*.[243] *Banker* held that

> [u]nder W. Va. Code, 48-2-15(e) (1993), a circuit court has jurisdiction to hear and rule upon a motion seeking modification of a decree to include alimony, as the ends of justice may so require, even though the decree previously denied alimony or did not address the issue of alimony. To the extent that *Savage v. Savage*, 157 W. Va. 537, 203 S.E.2d 151 (1974), and its progeny are inconsistent, they are expressly overruled.[244]

Justice Cleckley tempered the reach of his decision on alimony:

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240 460 S.E.2d 264 (W. Va. 1995).

241 *Id.* at Syl. Pt. 3.

242 *Id.* at Syl. Pt. 4.

243 474 S.E.2d 465 (W. Va. 1996).

244 *Id.* at Syl. Pt. 2.

> When a party to a divorce action neglects to assert a claim of alimony for an unreasonable and unexplained length of time and other circumstances cause prejudice to the adverse party, relief should be denied on the grounds of laches. However, the mere lapse of time is not enough to invoke the doctrine. For laches to apply, the circuit court must consider the circumstances surrounding the delay and any disadvantage and prejudice to the other party caused by the delay.[245]

C. *Child Abuse and Neglect*

The case of *In re Christina L.*[246] required Justice Cleckley to elaborate upon several issues under the state's civil abuse and neglect statutes. First, the opinion expanded the meaning of abused child under the state's civil abuse and neglect statutes:

> Where there is clear and convincing evidence that a child has suffered physical and/or sexual abuse while in the custody of his or her parent(s), guardian, or custodian, another child residing in the home when the abuse took place who is not a direct victim of the physical and/or sexual abuse but is at risk of being abused is an abused child under W. Va. Code, 49-1-3(a) (1994).[247]

The next issue addressed in *Christina L.* involved procedural requirements for terminating parental rights due to civil abuse or neglect. The opinion held that "[w]hen the West Virginia Department of Health and Human Resources seeks to terminate parental rights where an absent parent has abandoned the child, allegations of such abandonment should be included in the petition and every effort made to comply with the notice requirements of W. Va. Code, 49-6-1 (1992)."[248] The final issue Justice Cleckley touched upon in *Christina L.* involved visitation between a child and the parent whose rights were terminated:

> When parental rights are terminated due to neglect or abuse, the

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245 *Id.* at Syl. Pt. 3.

246 460 S.E.2d 692 (W. Va. 1995).

247 *Id.* at Syl. Pt. 2.

248 *Id.* at Syl. Pt. 6.

> circuit court may nevertheless in appropriate cases consider whether continued visitation or other contact with the abusing parent is in the best interest of the child. Among other things, the circuit court should consider whether a close emotional bond has been established between parent and child and the child's wishes, if he or she is of appropriate maturity to make such request. The evidence must indicate that such visitation or continued contact would not be detrimental to the child's well being and would be in the child's best interest.[249]

D. Paternity

The case of *Mildred L.M. v. John O.F.*[250] permitted Justice Cleckley to address issues involving paternity. The opinion held that "[u]nder W. Va. Code, 48A-6-3 (1992), undisputed blood or tissue test results indicating a statistical probability of paternity of more than ninety-eight percent are conclusive on the issue of paternity, and the circuit court should enter judgment accordingly."[251] It was also held that:

> [w]here the foundation is sufficient to show by a preponderance of the evidence the proper testing procedures were employed and the expert witness who interpreted the test results was qualified, courts may take judicial notice of the accuracy and reliability of HLA blood-tissue test results introduced in paternity cases pursuant to W. Va. Code, 48A-6-3 (1992).[252]

The case of *State ex rel. Roy Allen S. v. Stone*[253] afforded Justice Cleckley an additional opportunity to address paternity issues. The opinion laid down initial procedural guidelines in a paternity action:

> When a putative biological father raises a paternity claim, the child must be joined and a guardian ad litem appointed. The circuit

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249 *Id.* at Syl. Pt. 5.

250 452 S.E.2d 436 (W. Va. 1994).

251 *Id.* at Syl. Pt. 5.

252 *Id.* at Syl. Pt. 4.

253 474 S.E.2d 554 (W. Va. 1996).

> court should conduct a preliminary hearing to determine whether the requisite preconditions are present. In addition, the preeminent factor in deciding whether to grant or deny blood testing is the child's best interests. The analysis of each factual situation is necessarily a discretionary decision for the circuit court, and the finding by the circuit court will not be reversed absent an abuse of discretion.[254]

The opinion then addressed the specific situation involving a child who was born while the mother was married to someone other than the putative biological father:

> In the absence of special circumstances which would justify an exception, a petition by a putative biological father seeking to establish his paternity over a child who was born while the mother was married to another man may not proceed unless the putative father clearly and convincingly proves as a threshold matter that he has established a substantial paternal relationship with the child. The putative father's showing need not be made, however, if no person or party (named or intervening and including the guardian ad litem) contests the petition.[255]

Finally, the opinion held,

> [a] putative biological father must prove by clear and convincing evidence the following factors before he will have standing to raise the issue of paternity of a child born to a married woman who is not his wife: (1) that he has developed a parent-child relationship with the child in question, and (2) that the child will not be harmed by allowing the paternity action to proceed.[256]

E. Child Custody

In the case of *West Virginia Department of Health and Human Resources*

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254 *Id.* at Syl. Pt. 7.

255 *Id.* at Syl. Pt. 3.

256 *Id.* at Syl. Pt. 6.

ex rel. Wright v. David L.,[257] the West Virginia Supreme Court of Appeals had to determine whether a parent seeking child custody may authorize, on behalf of the children, the secret recording of the children's conversations. Justice Cleckley ruled that "[a] parent has no right on behalf of his or her children to give consent under W. Va. Code, 62-1D-3(c)(2) (1987), or 18 U.S.C. § 2511(2)(d) (1988) to have the children's conversations with the other parent recorded while the children are in the other parent's house."[258]

The issue of child custody under the federal Parental Kidnaping Prevention Act (the "Act") was the central focus in *Sheila L. on Behalf of Ronald M.M. v. Ronald P.M.*[259] As an initial matter, Justice Cleckley held that "[e]mergency custody matters should be among those cases given priority by our court systems and should be resolved as quickly as is reasonably feasible."[260]

The opinion in *Sheila L.* then explained the basis for jurisdiction under the Act:

> Under the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A(d), a court may continue its jurisdiction if it has made a child custody determination consistent with the provisions of this section, if it maintains jurisdiction under its law, and if either the child or a contestant continues to reside in the state. A custody determination is defined in 28 U.S.C. § 1738A(b)(3) as a judgment, decree, or other order of a court providing for the custody or visitation of a child, and includes permanent and temporary orders, and initial orders and modifications.[261]

Additionally, it was said that

> [t]o assume jurisdiction in an emergency situation under the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A(c)(1) and (2)(C), a state must have jurisdiction under its own law, the child must be physically present in the state, and the child must be either abandoned or in an emergency situation that necessitates action to

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257 453 S.E.2d 646 (W. Va. 1994).

258 *Id.* at Syl. Pt. 4.

259 465 S.E.2d 210 (W. Va. 1995).

260 *Id.* at Syl. Pt. 7.

261 *Id.* at Syl. Pt. 2.

> protect the child being subjected to or threatened with mistreatment or abuse.[262]

The opinion noted that

> [u]nsubstantiated statements of a parent that a child is being subjected to or threatened with mistreatment or abuse, by themselves, cannot serve as a basis to invoke jurisdiction of a court to enter or modify a permanent custody award under the Parental Kidnaping Prevention Act, 28 U.S.C. § 1738A(c). A parent is not precluded merely because of unsubstantiated statements from raising allegations of mistreatment or abuse in a court that has jurisdiction to enter or modify a permanent custody award on other grounds; nor is that court prevented from considering such unsubstantiated statements in entering a temporary order to protect a child from an emergency situation of abuse.[263]

Justice Cleckley then addressed the issue of a court taking emergency jurisdiction over a child under the Act:

> It is consistent with the intent of the Parental Kidnaping Prevention Act of 1980, 28 U.S.C. § 1738A, that a court without jurisdiction on other grounds may invoke temporary emergency jurisdiction if its exercise of jurisdiction is consistent with the laws of the state where the court is located, the child is physically present in that state, and the child is in need of protection as a result of being subjected to or threatened with mistreatment or abuse. 28 U.S.C. § 1738A(c)(1) and (2)(C).[264]

Justice Cleckley concluded in *Sheila L.* that

> [i]f emergency jurisdiction is based upon the unsubstantiated statements of a parent, additional evidence should be gathered as quickly as reasonably possible to either affirm or negate the allegations. Temporary jurisdiction should last only so long as the

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262 *Id.* at Syl. Pt. 3.

263 *Id.* at Syl. Pt. 4.

264 *Id.* at Syl. Pt. 5.

> emergency exists or until a court that has jurisdiction to enter or modify a permanent custody award is apprised of the situation and accepts responsibility to ensure that the child is protected.[265]

F. Circuit Court Review of Family Law Master Recommendation

The case of *Stephen L.H. v. Sherry L.H.*[266] afforded Justice Cleckley a chance to clarify the review posture circuit courts must take in examining findings of fact by family law masters. The first task was to discern legislative intent in the use of the phrases "abuse of discretion" and "unsupported by substantial evidence," as those terms were used by statute to describe review of family law master findings by circuit courts:

> When the Legislature enacts laws, it is presumed to be aware of all pertinent judgments rendered by the judicial branch. By borrowing terms of art in which are accumulated the legal tradition and meaning of centuries of practice, the Legislature presumably knows and adopts the cluster of ideas attached to each borrowed word in the body of learning from which it was taken and the meaning its use will convey to the judicial mind unless otherwise instructed. When the Legislature enacted W. Va. Code, 48A-4-20(c) (1993), it intended the phrases "abuse of discretion" and "unsupported by substantial evidence" as used in this section to encompass the entire panoply of definitions which the judicial branch had previously ascribed to those terms.[267]

The opinion ruled that "[a] circuit court should review findings of fact made by a family law master only under a clearly erroneous standard, and it should review the application of law to the facts under an abuse of discretion standard."[268] Justice Cleckley elaborated upon the clearly erroneous standard by stating that "[u]nder the clearly erroneous standard, if the findings of fact and the inferences drawn by a family law master are supported by substantial evidence, such findings and inferences may not be overturned even if a circuit court may be inclined to make

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265 *Id.* at Syl. Pt. 6.

266 465 S.E.2d 841 (W. Va. 1995).

267 *Id.* at Syl. Pt. 2.

268 *Id.* at Syl. Pt. 1.

different findings or draw contrary inferences."[269] The opinion concluded,

> [i]f a circuit court believes a family law master failed to make findings of fact essential to the proper resolution of a legal question, it should remand the case to the family law master to make those findings. If it is of the view that the findings of fact of a family law master were clearly erroneous, the circuit court may set those findings aside on that basis. If it believes the findings of fact of the family law master are unassailable, but the proper rule of law was misapplied to those findings, the circuit court may reverse. However, a circuit court may not substitute its own findings of fact for those of a family law master merely because it disagrees with those findings.[270]

VII. PROPERTY LAW

A. Government Sale of Property

The sale of property by the division of highways pursuant to W. Va. Code section 17-2A-19 was the subject in *Mills v. Van Kirk*.[271] Justice Cleckley's interpretation of the statute provided:

> Applying the plain language of the statute, abutting landowners must receive preferential treatment when purchasing state property pursuant to W.Va. Code, 17-2A-19 (1988). Under this statutory scheme, the Commissioner has the right to decide whether turnpike and railway property will be useful in the present or foreseeable future. Once this decision is made, the statute directs the Commissioner to first offer the property to the abutting landowners for fair market value.[272]

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269 *Id.* at Syl. Pt. 3.

270 *Id.* at Syl. Pt. 4.

271 453 S.E.2d 678 (W. Va. 1994).

272 *Id.* at Syl. Pt. 3.